FILE COPY

JUN 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, *et al.*,

Appellants,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, *et al.*,

Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

PETITION OF APPELLANTS FOR REHEARING

and

MOTION TO DEFER ISSUANCE OF MANDATE

PARKER MCCOLLESTER,
KENNETH L. SATER,
Attorneys for Appellant States.

INDEX

PAGE

I. The Decision 1

II. The interest of these appellants in seeking rehearing 2

III. In failing to hold that the Commission's order was invalid for lack of essential preliminary findings and in attempting to supply that lack by findings based upon its own examination of the evidence, the Court erred and acted in conflict with long established principles laid down by its decisions 3

IV. The decision is at variance with what has heretofore been consistently decided with regard to the essentials for an order requiring an increase in freight rates, and unduly enlarges the authority of the Commission to prescribe minimum rates 6

V. In holding that a finding of discrimination can be based upon differences not in rates charged but in rates which are described by the same name but have different purposes in different territories, the Court errs and has introduced into the law a new conception of discrimination under Section 3 of the Act 10

VI. It was error to conclude that a valid ultimate finding of undue preference and prejudice could be predicated upon the existence of differences in rates published in tariffs without findings or proof that these rates are actually charged for the transportation or similar and competing freight. If the Court was led to believe that there were such findings or itself made such findings, this was in error 14

VII. The Court was in error in its conclusion as to the Commission's findings and as to the sufficiency of the evidence of territorial injury from the differences in class rate levels to sustain an ultimate finding of undue prejudice and preference 17

PAGE

VIII. The decision rests upon incorrect conclusions as to the cost computations and reflects other erroneous impressions or assumptions 21

IX. The Court errs in holding that in the absence of a finding that the class rates in Official Territory are less than compensatory, the Commission may nevertheless order an increase in those rates on the ground that it is impractical to reduce the rates in the South and West to the official level 21

CONCLUSION 23

MOTION FOR STAY OF MANDATE 23

CERTIFICATE OF GOOD FAITH 24

CERTIFICATE OF SERVICE 25

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, *et al.*,

Appellants,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, *et al.*,

Respondents.

PETITION OF APPELLANTS FOR REHEARING and MOTION TO DEFER ISSUANCE OF MANDATE

Now come the States of New York, Delaware, Indiana, Maryland, Michigan, New Jersey, Ohio, Wisconsin and the Commonwealth of Pennsylvania, appellants in the above entitled case, and pursuant to Rule 33 of the Revised Rules of this Court, respectfully petition this Court for rehearing of this cause and as grounds for their petition, respectfully show:

I

The decision.

The Court's decision, with Mr. Justice Frankfurter and Mr. Justice Jackson dissenting, was rendered on May 12,

1947. The opinion of the Court by Mr. Justice Douglas upheld, as a valid exercise of the Interstate Commerce Commission's authority under Section 3 (1) of the Act to remove discrimination between territories, the order of the Commission in the so-called *Class Rate Case*, which would require an increase of 10 per cent in the class rates for transportation within Official territory and a 10 per cent reduction in the class rates for transportation within the South and West and from those territories to Official territory.

II

The interest of these appellants in seeking rehearing.

These appellants are naturally chiefly concerned with that part of the Commission's order which would require a 10 per cent increase in class rates actually charged for the transportation of freight, largely manufactured articles within Official territory, and would thereby impose a very great added burden upon the industry and commerce of the appellant States. Compared with the burden of these increases in rates, which are already highly profitable to the carriers for the services they render, the small benefit which the shippers in the South and West will receive from the reductions required by the order are minor, because the class rates from the South and West are charged on very little freight. The principal benefit, if any, which the Commission's order would produce for the South and West is the injury which it would cause to the appellant States in requiring shippers therein to pay increased freight charges in excess of rates which are reasonably compensatory for the transportation they receive.

It is submitted, with all respect, that the Court has erred in the respects indicated hereafter. It is submitted, also, that its decision will afford unintended precedent for

such a broadening of the scope of the Interstate Commerce Act as to invite re-examination and further discussion.

The extended argument allowed by the Court, the meticulous analysis of the case by Mr. Justice Douglas in the opinion of the Court and the dissenting opinions evidence such thorough consideration of this cause by the Court that if, as appellants believe, the decision reflects a mistaken apprehension of important features of the proceeding it is because different aspects of the case were not adequately presented. The shippers and communities of the appellant States should not suffer as a consequence.

In the circumstances, it is submitted that the seriousness of the decision to the appellant States and their citizens, the great added financial burden which the Commission's order would impose upon doing business in the appellant States, as well as the far-reaching consequences of certain features of the Court's decision as precedents in other proceedings, compel and justify this petition for rehearing pursuant to the privilege afforded by paragraph 33 of the Rules of this Court.

III

In failing to hold that the Commission's order was invalid for lack of essential preliminary findings and in attempting to supply that lack by findings based upon its own examination of the evidence, the Court erred and acted in conflict with long established principles laid down by its decisions.

The Court upholds the Commission's order in so far as it would require an increase in class rates within Official territory, not as a prohibition of unreasonably low rates in violation of Section 1 of the Act, but solely as a measure to remove alleged undue prejudice and preference as between territories in violation of Section 3 (1). It is

respectfully submitted, however, that there was a complete lack of preliminary facts essential to the ultimate conclusion of undue prejudice and preference and that, consistently with long established practice, the Court should have set aside the Commission's order on this ground.

In this connection it must be remembered that the Commission's finding of undue prejudice and preference is not based upon differences in the levels of the class rates in the several territories but only in the levels of the class rates from the South and West into Official territory and the level of the class rates within the latter territory. The Commission's order could be properly sustained under Section 3 only if there were the following essential preliminary findings of fact, which were entirely lacking in the Commission's report, and if such findings were supported by evidence:

1. That the differences in the levels of the class rates result in differences in freight charges paid by competing shippers of similar goods in the several territories.

2. That the fact that different levels of freight charges are demanded of competing shippers has been the cause of substantial injury to the South and West as territories and of substantial benefit to Official territory.

3. That the class rates exist and are maintained under similar conditions and for similar purposes in the several territories.

4. That the differences in the levels of the class rates are not justified by differences in the costs of transporting the traffic upon which they are charged (not differences in average costs of handling all freight).

5. That the class rates within Official territory are not fully compensatory for the transportation for which they

are charged or else that differences in the rates charged can be eliminated in no other way than by increasing the Official territory rates without causing other violations of the Act.

The complete lack of the foregoing findings, essential to sustain its ultimate determination, is not only apparent from the Commission's report but is emphasized by the opinion of this Court, which reflects an examination of the record, not to ascertain whether the findings of the Commission are supported by the evidence but to make findings which the Commission itself has failed to make. In so doing this Court acted contrary to its own precepts.

In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, it said (pp. 504-505):

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States, supra.* Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning."

This is the more serious in the present case because, as will be shown in the following points, the Court in endeavoring to support its conclusion has gone to the evidence, not to ascertain whether the Commission's findings were supported by the proof, but itself to make findings which the Commission did not make and has gained incorrect impressions in so doing.

IV

The decision is at variance with what has heretofore been consistently decided with regard to the essentials for an order requiring an increase in freight rates, and unduly enlarges the authority of the Commission to prescribe minimum rates.

In substantial effect, the decision holds that where territory-wide rate adjustments are concerned the Commission may require an increase in the rates within a territory without any finding or evidence that the rates are on a lower level than the freight charges actually paid by competing shippers of the same goods shipping into the territory; without any finding or evidence that the existing rates provide inadequate compensation to the carriers and in the face of evidence that they are actually highly profitable; without any finding or evidence that the existing rates threaten rate wars or otherwise adversely affect the financial stability of the railroads; without any finding or evidence that if the railroads do need additional revenue the increased rates will produce it instead of obstructing the movement of freight by rail, and solely because the rates are lower than rates which are called by the same name and are published in tariffs but are not charged for transportation into the territory from other rate territories.

It is submitted that this is a new and altogether unduly broad concept of the authority of the Commission to prescribe minimum rates.

In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627 (1933), the Court said (p. 633):

> "The evidence failed to show that the rates of the Texas & Pacific and the L. R. & N. on export and import shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic.

> "There was therefore no basis for an order fixing minimum reasonable rates under § 15(1) of the Act."

Again in *North Carolina* v. *United States*, 325 U. S. 507, the Court said at page 516:

> "The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intrastate rate fixed by North Carolina."

If without such findings the Commission may not order an increase in freight rates throughout a State merely because existing rates are lower than rates into the State from other States, it should follow that mere disparity between the levels of rates throughout a territory embracing several States and of rates into the territory from other territories affords no basis for an order increasing the former.

The Court upholds the Commission's order as one for the removal of undue prejudice and preference. Leaving to the next point the soundness of the conclusion sustaining the Commission's ultimate finding of discrimination, it must be noted that the authority of the Commission to require an increase in rates within a State likewise rests upon its power to remove discrimination. It is difficult to see why different requisites should exist for an order advancing intraterritorial rates from those which are necessary to sustain an order increasing intrastate rates to remove discrimination.

Moreover, the Court recognizes (Opinion, p. 59) that

> "The authority of the Commission to increase rates in order to remove discrimination, even though existing rates may be compensatory, is not unlimited."

If it were unlimited, Section 15a(2), would be meaningless in requiring that the Commission in the exercise of its power to prescribe just and reasonable rates shall give due consideration, among other factors

> "to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service."

It is submitted that the amendment to Section 3(1) of the Act adding thereto the word "territory" did not, and was not intended to, empower the Commission to deprive shippers in a territory of as low rates as are consistent with the furnishing of adequate and efficient railway service in that territory.

The Court's opinion meets this argument by citing the fact (pp. 59, 60) that the rates of return of the Eastern carriers, as well as their operating ratios, have in recent years been less favorable than those of the Southern and Western railroads. But this would justify increasing the class rates in Official territory only if there were findings supported by evidence (a) that the differences in the rates of return and operating ratios were due to the class rates rather than to other rates or factors, and (b) that an increase in the class rates in Official territory would improve the rate of return and operating ratio of the Eastern carriers. But there are no such findings and no such evidence.

In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, citing its decisions in *Florida* v. *United States*, 282 U. S. 194 and 292 U. S. 1, the Court said at pages 507 and 508:

> "There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. '*The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage*'."

In *Florida* v. *United States*, 292 U. S. 1, the Court said at page 8:

> "* * * in considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question was that of the relation of rates to income. But *to support the order then under review, the Commission had made no findings* as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or *that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service. Florida* v. *United States, supra*" (282 U. S. pp. 212, 214, 215, 75 L. ed. 302, 303, 304, 51 S. Ct. 119). (Italics added.)

It is submitted, therefore, that even if the Court was correct in upholding the Commission's ultimate finding of undue preference and prejudice in violation of Section 3, it should reconsider the conclusion that in the complete absence of findings or evidence heretofore deemed essential to an order requiring an increase in rates, the Commission acted within its authority in ordering a 10 per cent increase in the already highly compensatory* class rates for transportation within Official territory as the method of removing the discrimination.

It would be startling doctrine that in the absence of a finding that existing rates of a certain kind are not fully compensatory and in the face of evidence that they are highly profitable to the carriers for the services for which they are paid, shippers may be required to pay still higher rates, because rates elsewhere called by the same name are higher, although there is no finding that such higher rates

* See discussions of the evidence on this point at pp. 58 to 64 of Appellant's main brief.

are actually demanded of competing shippers for the transportation of similar goods. And yet that is what the Court's opinion, considered in the light of the record, appears to hold.

V

In holding that a finding of discrimination can be based upon differences not in rates charged but in rates which are described by the same name but have different purposes in different territories, the Court errs and has introduced into the law a new conception of discrimination under Section 3 of the Act.

It is submitted that the Commission is concerned with rates which are charged and not with what they are called. Because the Official territory lines see fit to publish the rates which they charge on a substantial volume of carload freight as class rates, it does not follow that the railroads in the South and West must call the rates which they charge on similar freight class rates or that there is unlawful discrimination if they do not do so. It is not the function of the Commission to prescribe what kind of freight rates shall be charged or they shall be called. It is concerned that the rates actually charged, whatever be their name, shall be just, reasonable and non-discriminatory.

Moreover, if it be within the functions of the Commission to induce traffic to move at class rates rather than at commodity or exception rates, this does not justify an order increasing the class rates in Official territory. Compliance with such an order would have either one of the following consequences. Either it would impose an added freight burden upon shippers, it would discourage the movement of freight altogether, or it would stimulate the establishment of commodity and exception rates in Official territory to equalize with those maintained in the South.

The vice of the Commission's order here is that there is no finding that the differences in the class rates produce differences in the rates actually charged.

It would be clear that a manufacturer in the South shipping to a Northern market and paying a commodity rate equal to the class rate paid by a competitor in Official territory shipping to the same market, could not be heard to complain of undue prejudice because the class rate from his Southern shipping point which he did not pay was higher than the Official territory class rate. And certainly, if the Commission should order the Official territory class rate increased to equalize it with the class rate from the South which was not charged, on the ground of removing discrimination, merely because both rates are termed "class rates", the Official territory shipper would be entitled to have the order stayed, especially if it appeared that the old class rate which he paid was highly compensatory. But, so far as the record and the Commission's findings are concerned, this is what the Commission's order here would do. And it is submitted that it cannot be sustained merely because it affects the individual shipper in Official territory along with all other shippers at class rates.

It seems probable, moreover, that the Court has not been made to understand the radical differences in the purposes of the class rates in the several territories. Because in each territory rates are called class rates does not mean that they have a similar purpose or use. This is made clear by the Commission in its several decisions in which the present class rates were prescribed. Thus, in the *Eastern Class Rate* case, in which the Commission prescribed the class rates now charged in Official territory (64 I. C. C. 314), the Commission said (p. 391):

> "* * * In the other territories class rates, at least in the past, appear to have been of particular interest to jobbers, and the traffic which they move seems to have been, and perhaps still is, predominantly less than carload. For carload traffic of any important volume

commodity rates have generally been provided. This is not the situation in official territory, where a great deal of very important carload traffic moves on class rates. Of the traffic embraced by the revenue test about 68 per cent was carload. Among the commodities which generally move in carloads on class rates in official territory but are given commodity rates in other territories are fruits and vegetables (including apples, cabbage, and potatoes), dairy products, vegetable oils, furniture, wrapping paper, soap, sash, doors, and blinds.

"A corollary of this situation is that, as compared with the class rates, the commodity rates on heavy, low-grade articles in official territory are often relatively high and in the other territories relatively low."

The Commission's order would require an increase in Official territory in the freight rates paid for transportation within that territory of fruits, vegetables, dairy products, furniture, wrapping paper, etc., on the assumption that thereby discrimination would be removed, although the differences in the levels of the class rates do not represent differences in the freight charges actually paid in the several territories for the transportation of these commodities.

Rates which are published as the rates to be charged on the large volume of carload traffic are not of the same kind with rates designed to be charged for occasional, unexpected movements or for less-car-load freight, merely because both are referred to as class rates. The rates serve different functions due to the complete differences in the rate structures of the carriers in the several territories. It is for this reason that the Commission acted arbitrarily in disregarding the rate structures as a whole, and in ruling that because the class rates are on different levels they are the cause of territorial discrimination which would be removed by equalizing the class rates alone. Instead to bring about equality of class rates only and to do this by raising the class rates in Official territory, while leaving untouched

all other parts of the rate structures, would simply discriminate against Official territory.

This is shown by the Commission's finding that the differences between the average ton mile revenues of the railroads in the East and of those in the South from all freight was approximately the same as the differences in the respective average computed costs of handling all freight. The Commission found that the average revenue from all freight in the South was "somewhere between 3 and 5 per cent" higher than the corresponding figure for the Eastern railroads (p. 607, R. 222). These figures correspond almost exactly with the differences of 3 to 6 per cent in average fully distributed costs for Official territory (including New England and Pocahontas) and the South shown in the table on page 579 of the Commission's report (R. 194). This illustrates the fallacy of dealing with parts of the rate structures only and assuming that because they are called by the same name differences in them indicate discrimination between territories.

It seems from the opinion that the Court has been led into error in its entire approach to the question of discrimination by incorrectly assuming (a) that because the rates bear the same titles they play the same roles in transportation and therefore differences between them presumably create discrimination and (b) by failing to observe that its whole discussion turns on what rates are called, rather than upon what rates are charged.

VI.

It was error to conclude that a valid ultimate finding of undue preference and prejudice could be predicated upon the existence of differences in rates published in tariffs without findings or proof that these rates are actually charged for the transportation of similar and competing freight. If the court was led to believe that there were such findings or itself made such findings, this was in error.

On page 14 of the opinion there are comparisons of class rates to destinations in Official territory from origins in other territories with class rates within Official territory for approximately equal distances. These comparisons show, of course, that the class rates from origins in the South, Southwest and Western Trunk-Line territories are the higher. On page 15 of the opinion, referring to the tables just cited, it is said:

> "The disadvantage to the Southern or Western shipper who attempts to market his product in Official Territory is obvious."

With all respect, we submit that this is a statement which is not supported by the evidence and goes beyond anything that the Commission itself found. The disadvantage to a southern or western shipper, if he shipped at class rates into Official territory, would be obvious. But less than one per cent of freight from the South to Official territory is charged at class rates. And for all that appears, if class rates are charged, they may, by reason of the lower classification ratings, be actually as low as or lower than the rates charged for the transportation of the same freight in Official territory. The Commission itself found (p. 508, R. 123):

> "In fact, on many articles a shipper in a lower-rated territory must pay higher rates than one in a higher-rated territory, owing to differences in classification ratings."

Taking the examples on page 16, certainly the fact that the first class rate for a haul of 200 miles in the South is $1.12 as compared with a first class rate of 80 cents in Official territory does not indicate a rate disadvantage against the South with respect to the articles classified first class in Official territory, which are rated from Class 70 to Class 45 in the South with rates for 200 miles ranging from 78 cents down to 45 cents. Nor can any justification be found on the ground of removing prejudice or equalizing freight rates for increasing by 10 per cent the first class rate of 80 cents paid by a shipper in Official territory for the transportation of a commodity which in the South is rated Class 45 and pays a rate of 50 cents, or on the same ground for reducing the southern rate from 50 to 45 cents.

It is said in the opinion that the illustrations given are representative of the rest and show how disparities in the rate levels are aggravated when the effect of classification differences on rates are considered. Rather, these examples clearly show that in requiring increases in class rates in Official territory and reductions in the other territories in advance of the prescription of a uniform classification, the Commission's order was premature.

Numerous examples appear in the opinion which indicate that the Court failed fully to comprehend that the Commission very definitely did not find that the differences in the class rates reflected differences in the rates charged or caused injury to shippers in the South and Southwest or to those territories and that the Court erred in itself in basing its decision upon contrary assumptions. Thus, on pages 5 and 6 of the opinion it is said that the Commission

> "found that higher class rates have impeded the development and movement of class rate freight within Southern, Southwestern and Western Trunk-Line territories and from those territories to Official Territory."

The Commission, however, used weasel words but very definitely did not so find. What it did find is that the differences in the levels of the class rates "have prevented the free movement of traffic at the rates in issue" (p. 696, R. 311). The Commission did not find that the "movement of class rate freight" has been impeded. Its finding and the evidence is all to the effect that commodities, at exception rates, have been provided for freight in the Southwest which moves in Official Territory.

Again, on page 15, after citing tables of first class rates, the opinion states that the comparison shows that shippers in the South and West, for identical commodities, "*on the whole* pay higher charges than the shippers in Official Territory for equivalent service". With all respect, it is submitted that the Commission has made no finding that the freight charges *paid* by shippers in the South and West are higher on the whole than the freight charges paid by shippers in Official Territory.

On page 16 the Court refers to what it calls "rather voluminous evidence in the record tendered to show the effect in concrete competitive situations of these class rate inequalities" and concludes therefrom that they support the proposition that class rates in the other territories are "generally much higher, article for article, than the rates within Official Territory" and this is then referred to as "the basic finding of the Commission". Again we submit that an examination of the Commission's own discussion of these "concrete competitive situations" indicates that it was the Commission's finding that these examples did not generally reflect differences in freight charges caused by the differences in the class rates.

On page 17 it is said that the basic finding of the Commission is "that class rates within Southern, Southwestern and Western territories, and from those territories to Official Territory, are generally much higher, article for article, than the rates within Official Territory."

Then it is said:

> "Thus discrimination in class rates in favor of Official Territory and against the Southern, Southwestern and Western Trunk Line territories is established."

Again, with all respect, it is submitted that here the opinion extends the concept of discrimination beyond previously recognized limits and in a way which invites future trouble, not to say injustice, in the administration of the statute. It has heretofore been well recognized that mere showing of differences in rates which are published but are not charged does not establish discrimination.

It is said (p. 19) that appellants' argument "takes too narrow a view of the problem confronting the Commission." It is said, first, "We start of course with some showing of actual discrimination against shippers by reason of their use of class rates." With all respect, it is submitted that the Commission's report will be searched in vain for anything like a finding of unlawful discrimination against any shippers by reason of differences in the levels of the class rates.

VII

The Court was in error in its conclusion as to the Commission's findings and as to the sufficiency of the evidence of territorial injury from the differences in class rate levels to sustain an ultimate finding of undue prejudice and preference.

Granting for the sake of argument that differences in published class rates as distinguished from rates charged establishes discrimination, the opinion observes (p. 17) that "mere discrimination does not render a rate illegal under § 3. *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 521." With this we, of course, agree.

Here it is submitted that there is a complete absence of any necessary preliminary findings by the Commission of injury to either shippers or territories, and with all respect it is submitted that the Court; to sustain its decision and uphold the Commission's order, has assumed facts and itself made findings beyond those dreamt of by the Commission and without evidentiary support.

On page 22 the opinion refers to the inquiry of the Commission into the effect of class rates on the economic development of the Southern and Western territories and states that the Commission "concluded that prejudice to the territories in question had been established". It is true that the Commission made an ultimate finding in the language of the statute that differences in class rates resulted in undue prejudice to Southern and Western territories, but this was plainly not intended as a preliminary finding of substantial injury to those territories. The Commission's discussion of the evidence plainly negatives any finding of injury. The Court has seen fit in its opinion to set forth tables and statistics to support its assumption that there was such injury, but it is significant that quite other tables and statistics are included in the report of the Commission and that the latter plainly demonstrate that although, of course, the South was late in beginning its industrial growth, and has not yet attained the proportions of that in the North, nevertheless, by all recognized standards, neither the freight rates nor anything else have barred the industrial development of the South. So much is this the fact that, as the record shows and the Commission finds, it was boasted of by the Southern Governors.

It may be argued that where territories are concerned discrimination may be established by something other than a showing of unlawful prejudice and preference as between individual shippers, with injury to some and benefit to their competitors. However, the absence here of such evidence with respect to individual shippers and,

even more significantly, the absence of any finding by the Commission of injury to individual shippers by reason of the differences in the class rate levels is at least an important indication that the differences in the levels of the class rates are not the cause of discrimination between territories as a whole.

However, apart from proof of the effect of rates upon individual shippers, it may be conceded that territorial discrimination might be established by preliminary findings and evidence to support findings that the differences in the levels of the class rates have discouraged business in one territory and encouraged it in another, have prevented the location of new industries in the higher rated territory, or have in one way or another imposed obstacles to industrial and economic development. Of such findings, however, the Commission's report is entirely barren. The opinion, referring to the remark in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 450 that "Discriminatory rates are but one form of trade barriers", states that their effect

> "is not only to impede established industries but to prevent the establishment of new ones, to arrest the development of a state or region, to make it difficult for an agricultural economy to evolve into an industrial one."

But certainly the language quoted is not descriptive either of the findings of the Commission or of the evidence in this case.

The Commission specifically found that there was no proof that any industry had been prevented from locating in the South by the differences in the levels of the class rates (p. 622, R. 237). The Commission's analysis of the evidence as to the relative industrial growth of the different sections of the country clearly negatives any finding by the Commission that the differences in the levels of the class rates have operated "to impede established

industries * * * to prevent the establishment of new ones, to arrest the development of a State or region, to make it difficult for an agricultural economy to evolve into an industrial one".

The Court may have been impressed by a theory propounded by counsel for the Government in brief that a new prospective small business may be discouraged from locating in the South by the class rates because of difficulty in or time required for securing the establishment of commodity or exception rates. Such a situation could be imagined, but so far as the present proceeding is concerned it can exist only in imagination because the Commission has made no finding that the class rates have so operated in so far as territories as a whole are concerned.

On page 43 it is said that

> "The class rate traffic is largely that of small shippers, who do not have the ability to obtain the benefit of the lower exception or commodity rates."

The Commission has made no finding either that class rate traffic is largely that of small shippers nor is there any finding or evidence that any shippers, large or small, have been denied exception or commodity rates. But if that were the fact it would certainly not justify increasing the class rates which are charged on 5.8 per cent of the very large volume of carload traffic in Official territory.

Moreover, despite the protestations to the contrary, the discussion in the opinion makes it clear that the real objective of the Commission's order insofar as it would require an increase of rates in Official territory is to penalize the cost of industrial production in Official territory in order to stimulate the industrial growth of the South and West. We still submit that it is beyond the authority of the Commission to prescribe rates for such a purpose.

There is only one thing certain in this situation and that is that the order of the Commission will require the ship-

pers in Official territory to pay substantial increases amounting to many millions of dollars in freight rates which are already highly compensatory to the carriers.

VIII

The decision rests upon incorrect conclusions as to the cost computation and reflects other erroneous impressions or assumptions.

It is submitted that the opinion gives incorrect weight to the cost computations and fails to recognize the fact that these cost computations are computations of average costs, that they do not purport to reflect differences in costs of handling class rate traffic, with which alone the Commission's order is concerned, and that they emphasize the error and arbitrary nature of the order in requiring a change in the class rates apart from the general rate structure.

Without burdening the Court with further reargument of the case, it is submitted that despite the careful analysis which it reflects, the opinion of Mr. Justice Douglas nevertheless indicates that the ultimate decision of the Court is the result of other serious errors both of assumption and of omission.

IX

The Court errs in holding that in the absence of a finding that the class rates in Official Territory are less than compensatory, the Commission may nevertheless order an increase in those rates on the ground that it is impractical to reduce the rates in the South and West to the official level.

Discussion of this phase of the matter is found at pages 55 to 60 of the opinion. It is perhaps the most serious phase of the proceeding from a legal standpoint. The

Court discusses the various decisions bearing upon the prescription by the Commission of minimum rates in all of which, as the opinion recognizes, exercise of minimum rate power has been upheld because of findings either that the existing rates were not compensatory or that they threatened destruction to competing forms of transportation. In the present case no such finding is, of course, possible. However, the Court says that (p. 58):

> "If the Commission were powerless to increase rates to a reasonable minimum in order to eliminate an unlawful discrimination, unless existing rates were shown to be non-compensatory or unless ruinous competition would result, it would in some cases be powerless to prescribe the remedy for unlawful practices."

It is submitted that here, as in the Commission's action, there is a fundamental fallacy. The fallacy is in assuming that discrimination exists at all because rates are on different levels when the circumstances are such that to bring them to the same level will mean either increasing rates which are already highly profitable or reducing other rates to a non-compensatory level. If such conditions exist, it is submitted that the differences in rate levels cannot constitute unlawful discrimination, and, therefore, that the premise of the reasoning is non-existent.

Besides, as has already been said, such a conception would nullify Section 15a (2).

Moreover, to require shippers in Official territory to pay higher rates than are necessary to provide liberal compensation to the railroads, in order that the rates paid by southern shippers may be equalized, without becoming non-compensatory, would certainly discriminate against the former. It would require them to pay a greater measure of return to the railroads than paid by southern shippers.

Certainly the Court's opinion on this point if allowed to stand would work a radical change in the law as it has previously been conceived.

Conclusion

It is therefore submitted, in view of the great importance of the case to the appellant States and their citizens, the seriousness of the issues, and the consequences which the decision will undoubtedly have as a precedent in the future, rehearing should be had in order that the issues may be more fully discussed and considered and the errors described corrected.

Appellants, therefore, respectfully pray that the Commission may grant rehearing herein.

Motion for Stay of Mandate

Appellants also pray that pending consideration of this petition, and if the petition be granted, then pending rehearing and final determination thereon, the Court may stay the issuance of its mandate.

Respectfully submitted,

PARKER MCCOLLESTER,
KENNETH L. SATER,
Attorneys for Appellant States.

NATHANIEL L. GOLDSTEIN
Attorney General, State of New York

FRANK J. CLARK
Special Assistant Attorney General, State of New York

CLAIR JOHN KILLORAN
Attorney General, State of Delaware

JAMES A. EMMERT
Attorney General, State of Indiana

KARL J. STIPHER
Deputy Attorney General, State of Indiana

HALL HAMMOND
Attorney General, State of Maryland

FOSS O. ELDERE
Attorney General, State of Michigan

JAMES W. WILLIAMS
Assistant Attorney General, State of Michigan

WALTER D. VAN RIPER
Attorney General, State of New Jersey

ROBERT PEACOCK
Deputy Attorney General, State of New Jersey

HUGH S. JENKINS
Attorney General, State of Ohio

JOHN E. MARTIN
Attorney General, State of Wisconsin

HERBERT T. FERGUSON
Assistant Attorney General, State of Wisconsin

JAMES H. DUFF
Attorney General, Commonwealth of Pennsylvania

E. A. DELANEY
Deputy Attorney General, Commonwealth of Pennsylvania

of Counsel

Certificate of Good Faith.

I HEREBY CERTIFY that this petition for rehearing is presented in good faith and not for delay.

PARKER MCCOLLESTER,
Of Counsel for the Above Named
Appellant States.

Certificate of Service.

I hereby certify that copies of the foregoing document were this day mailed to the following counsel of record:

Tom C. Clark, Attorney General
Department of Justice
Washington, D. C.

Solicitor General
Department of Justice
Washington, D. C.

David O. Mathews, Special Assistant to the Attorney General
Department of Justice
Washington, D. C.

Daniel W. Knowlton, Chief Counsel
Interstate Commerce Commission
Washington, D. C.

Edward M. Reidy, Assistant Chief Counsel
Interstate Commerce Commission
Washington, D. C.

J. V. Norman
Kentucky Home Life Building
Louisville, Kentucky

Byron M. Gray
608 National Bank of Topeka Building
Topeka, Kansas

George T. Simpson
State Capitol Building
St. Paul, Minnesota

C. B. Bee
State Capitol
Oklahoma City 5, Oklahoma

Walter R. McDonald
Georgia Public Service Commission
Atlanta, Georgia

Douglas F. Smith
11 South LaSalle Street
Chicago, Illinois

H. C. Barron
Western Traffic Executive Committee
Room 310, Union Station
Chicago, Illinois

Henry E. Foley
10 Post Office Square
Boston, Massachusetts

Dated this 5th day of June, 1947.

PARKER MCCOLLESTER,
Of Counsel for Above Named
Appellant States.